

DATE: October 15, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-32421

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 45 years old. He is employed by a defense contractor, in whose employ he worked his way up from the mail room to a managerial level, obtained a college degree, married, bought a house, and has two children, one in college and one in high school. At the age of 17, in 1975, he was arrested for burglary and assault. Convicted in 1976, he was sentenced to confinement for eight years. He served two years incarceration, and was on parole until 1981. Applicant is a manager for a defense contractor, and has had a secret clearance since 1981. Applicant mitigated the criminal conduct security concerns. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

STATEMENT OF THE CASE

On June 3, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under the personnel security Guidelines J (Criminal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

On June 25, 2003, Applicant responded to the SOR allegations. He requested his case be decided on the written record in lieu of a hearing. On July 3, 2003, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to the Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed a response to the FORM on August 13, 2003. This case was assigned to me on September 25, 2003.

FINDINGS OF FACT

Applicant admitted the allegations in all subparagraphs of the SOR. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 46 years old. He is married with two children. His children, a girl in high school, and a son in college, are doing very well academically. Applicant owns his home, and is a law abiding family member in his community. Applicant is a manager at a defense contractor, having worked his way up from the mail room. He obtained a college degree in 1994 and graduated cum laude. He completed his college degree while working, and having two children to raise. (Exhibit 3; Exhibit 4 at 1)

Applicant has had a security clearance since 1981. Applicant seeks to renew his secret clearance so he can continue his employment. (Exhibit 3; Exhibit 4 at 7)

Applicant was 17 years old when he was arrested in June 10, 1975, for burglary and assault. He was born in September, 1957. He was convicted on his plea of guilty on April 23, 1976, at the age of 18. He was sentenced to eight years confinement in the state penitentiary. He served two years of confinement, and was released on parole. He successfully completed parole in 1981. (Exhibit 3 at 1; Exhibit 4 at 1 and 5; Exhibit 5 at 1 to 3)

Applicant coaches Little League baseball. His performance evaluations are positive, and he has received numerous performance awards. He attends his local church. Applicant's stepfather provided a home for Applicant after Applicant was released from prison, and assisted him in making better choices in his life and set him on a path which led to Applicant's current success. (Exhibit 3; character letters)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The president has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the voluntariness of participation;
- (6) the presence or absence of rehabilitation and other pertinent behavioral changes;

- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the guidelines.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. See *Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a prima facie case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline J - Criminal Conduct

(A) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

(B) Conditions that could raise a security concern and may be disqualifying include:

(1.) Allegations or admissions of criminal conduct, regardless of whether the person the person was formally charged;

(2.) A single serious crime or multiple lesser offenses.

(C) Conditions which could mitigate security concerns include:

(1.) The criminal behavior was not recent;

(6.) There is clear evidence of successful rehabilitation.

Smith Amendment

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act of Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of that Act. The amendment was added to Title 10, United States Code, adding a new section (10 U.S.C. § 986) that precludes the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described in this case involves one of those specific circumstances.

The statutory mandate applies to any employee of a DoD contractor, who is under consideration for the issuance or continuation of eligibility for access to classified information and who has been convicted in any court of the United States or a crime and sentenced to imprisonment for a term exceeding one year, regardless of the time actually served.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Guideline J (Criminal Conduct) is quite clear in its statement that "A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness." The Disqualifying Conditions (DC) applicable here are 1 (Allegations or admission of criminal conduct, regardless of whether the person was formally charged) and 2 (A single serious crime or multiple lesser offenses). Applicant has one arrest in 1975, and a resulting conviction in 1976. The Government proved its case on these allegations under this guideline.

The Mitigating Conditions (MC) applicable on these facts in this case are MC 1 (The criminal behavior was not recent), 2 (The crime was an isolated incident), and 6 (There is clear evidence of successful rehabilitation). The crime itself was 28 years ago. It was the only crime Applicant committed. His family circumstances (a broken home, a lack of a stable home, being in a "bad" crowd as a teenager) were pressures on him which made him take the wrong path as a young man. Over the past 28 years, he rehabilitated himself through the help of his stepfather, married and created a stable home environment for his family, including his two children. His children, a girl in high school, and a son in college, are doing very well academically. Applicant owns his home, and is a law abiding family member in his community. Applicant has successfully rehabilitated himself, and is a valuable member of the community.

Regardless of the analysis under the Guideline J that would grant him a security clearance, the Smith Amendment, 10 U.S.C. § 986, precludes the granting or renewal of a security clearance to those applicants for access who have been convicted in any Federal or State court and sentenced to more than one year, regardless of the time actually served. Applicant was convicted in 1976 of two offenses and sentenced to eight years confinement in the state penitentiary. Regardless of the time actually served in confinement and on parole, the original sentence was eight years of incarceration. Therefore, he falls within the purview of the Smith Amendment. He is ineligible for a clearance without a waiver. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline J: Against Applicant

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

DECISION

In light of all the circumstances and facts presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Philip S. Howe

Administrative Judge

